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March 29, 2011

Marlene Dortch, Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

Re: Implementation of Section 224 of the Act; WC Docket No. 07-245

Dear Ms. Dortch:

On March 28, 2011, Paul Werner and the undersigned spoke with Michael Steffen, Advisor to the General Counsel, regarding the above captioned matter. Following up an earlier conversation,[1] we discussed the need to read Section 224 in a manner that gives effect to each subsection when implementing the telecommunications service (telecom) rate, as the Notice in this proceeding proposes to do.

We discussed Section 224(d)(3), which was added to Section 224 at the same time as Section 224(e) in the 1996 amendments. Section 224(d)(3) states in part: "This subsubsection shall apply to the rate for any pole attachment used by a cable television system solely to provide cable service."

We explained that this subsection must be understood in light of Congress's addition of separate allocation rules in Section 224(e) to guide the Commission's implementation of a separate formula for attachments used for telecom services. In Section 224(e), Congress directed the FCC to apply the stated apportionment rules for both the usable space (§224(e)(3)) and the space *other* than the usable space (§224(e)(2)), (so-called unusable space). In formulating the telecom rate, therefore, the FCC has to apply these two sections of (e) as well as determine the meaning of "cost" in each of these subsections.

Section 224(e) thus established allocation factors to be adopted in the FCC's determination of the telecom rate formula. It did not, however, ordain a particular telecom rate or mandate that the telecom rate would be invariably higher or lower than the cable service rate. (The Commission indeed contemplated that the telecom rate

[1] *See Ex Parte* Letter from Daniel Brenner to Marlene Dortch, WC Docket No. 07-245, filed Mar. 29, 2011.

may produce rates lower than the cable service rate, and that any such reductions were to take effect immediately.)[2]

Congress intended that these new allocation rules be used only for implementing the telecom rate. It made that intention clear by adding Section 224(d)(3). The words in (d)(3) -- "This subsection" -- refer to both (d)(1) and (d)(2), the latter defining "usable" space. To the extent that the Commission continued to set the rate for "cable only" attachments at the upper bound of subsection (d)(1)'s zone of reasonableness, Congress mandated that it was *only* to consider "usable" space (as defined in (d)(2)), not both allocation factors set forth in subsection (e).

By limiting the cable-service-only rate in this manner, Congress simply excluded consideration of unusable space from the cable rate calculation. It did not repeal or limit the application of Sections 224(b)(1) or its definition in Sec. 224(d)(1). Indeed, the U.S. Supreme Court's *Gulf Power* decision relies on those very sections to uphold the FCC's authority to establish pole rates for commingled attachments that are neither "cable-only" or "telecom" services.

As is clear from the words of subsections (b) and (d)(1), the cable rate and the telecom rate are both bounded by the same zone of reasonableness – with marginal costs at the lower end and fully allocated costs at the upper end. The 1996 Amendments did not change this. Section 224(e) created a separate methodology for determining telecom rates but not a new zone of "just and reasonable" rates. There is nothing in Section 224(e) that establishes a new upper bound that overrides the requirements of Sections 224(b) or (d)(1). There is only a prescribed methodology in Section 224(e). Section 224(d)(3) was added to insure that this methodology did not extend to cable-only attachments.

As Bright House explained in its previously filed comments, the FCC's Notice's proposal gives effect to both Sections 224(e)(3) and 224(e)(2).[3] And by setting Section 224(e)'s rate as the higher of the cable rate or the lower telecom rate (produced by redefining "costs"), the proposal produces a rate that gives effect to all other parts of the statute – 224(d)(3) and, importantly, Section 224(b), which looks to (d)(1) for the definition of "just and reasonable."

Finally, we pointed out on the call the importance of establishing a default rate for all attachments by cable operators, whether for cable service, telecom service, or services not yet defined by the FCC, in this proceeding.

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[2] 47 C.F.R. § 1.1409(f).

[3] Bright House Comments, WC Docket No. 07-245, GN Docket No. 09-51, at 15-19 (filed Aug. 16, 2010).

If you have any questions on these matters, please contact the undersigned.

Respectfully submitted,

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